Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, by his attorneys, Laventhall & Zicklin, Esqs., complaining of defendants on behalf of himself and all other purchasers and sellers of "odd-lots" on the defendant New York Stock Exchange similarly situated, alleges

As a First Cause of Action Against Defendants Carlisle & Jacquelin and DeCoppet & Doremus:

1. That this first cause of action arises under the Sherman Antitrust Act, §1, 15 U.S.C. §1.

2. That the jurisdiction of this Court is based upon the Clayton Antitrust Act, §4, 15 U.S.C. §15.

3. That at all times herein mentioned defendant New York Stock Exchange was and still is an unincorporated association which constitutes, maintains and provides a market place and facilities for bringing together purchasers and sellers of securities and for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood; said defendant New York Stock Exchange is registered as a national securities exchange pursuant to the Securities Exchange Act of 1934, §6, 15 U.S.C. §78f.

4. That plaintiff is an investor who, from time to time, and since at least 1960, has bought and sold stock registered on said defendant New York Stock Exchange in blocks of less than the ordinary unit of trading, which unit of trading

is, in most cases, one hundred (100) shares; each such block is referred to herein as an "odd-lot."

5. That plaintiff brings this action on behalf of himself and representatively on behalf of all purchasers and sellers of odd-lots on said defendant New York Stock Exchange. Plaintiff's claim and the claims of such persons involve common questions of law and fact and common relief is sought herein. Such persons are so numerous as to make it impossible to bring them all before the Court. Plaintiff will fairly insure the adequate representation of all such persons.

6. That at all times herein mentioned defendants Carlisle & Jacquelin and DeCoppet & Doremus were and still are limited partnerships under New York Partnership Law, Article 8, and member firms of said defendant New York Stock Exchange; each of said defendants Carlisle & Jacquelin and DeCoppet & Doremus is a registered odd-lot dealer on said defendant New York Stock Exchange and, as such, each buys and sells odd-lots for its own account.

7. That said defendants Carlisle & Jacquelin and DeCoppet & Doremus together handle, and have in the past handled, approximately ninety-nine (99%) percent of all odd-lot transactions on said defendant New York Stock Exchange.

8. That the odd-lot transactions of plaintiff and of those on whose behalf plaintiff brings this action have been executed with said defendants Carlisle & Jacquelin and DeCoppet & Doremus.

9. That at all times herein mentioned for the defendants Carlisle & Jacquelin and DeCoppet & Doremus did and each still does exact a charge known as a "differential," which it causes to enter into the price of the stock purchased

by or sold to plaintiff and those on whose behalf plaintiff brings this action.

10. That such differential is now twelve and one-half (12½¢) cents per share on all stocks selling below forty ($40) dollars per share and twenty-five (25¢) cents per share on all stocks selling at and above forty ($40) dollars per share.

11. That such differential has been established, increased and maintained by said defendants Carlisle & Jacquelin and DeCoppet & Doremus in conspiracy and combination with each other and with principal regional stock exchanges.

12. That said conspiracy and combination are in restraint of trade or commerce among the several states and, as such, are illegal under the Sherman Antitrust Act, §1, 15 U.S.C. §1.

13. That as a result of said conspiracy and combination, such differential is and has been greater than it would have been under free competitive conditions.

14. That as a result of such conspiracy and combination, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those represented by plaintiff have been damaged by paying more than they otherwise would have been paying for odd-lot purchases and receiving less than they otherwise would have received for odd-lot sales.

As a Second Cause of Action Against Defendants Carlisle & Jacquelin and DeCoppet & Doremus:

15. That this second cause of action arises under the Sherman Antitrust Act, §2, 15 U.S.C. §2.

16. Plaintiff repeats and re-alleges paragraphs numbered "2" through "14", both inclusive.

17. That said defendants Carlisle & Jacquelin and DeCoppet & Doremus have monopolized, and have combined and conspired to monopolize, dealings in odd-lot transactions in stocks listed on the New York Stock Exchange in violation of the Sherman Antitrust Act, §2, 15 U.S.C. §2.

18. That as a result of such monopolization, the aforesaid differential has been established, increased and maintained by said defendants Carlisle & Jacquelin and DeCoppet & Doremus.

19. That as a result of such monopolization, the differential is and has been greater than it would have been under free competitive conditions.

20. That as a result of such monopolization, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those whom plaintiff represents have been damaged by paying more than they otherwise would have had to pay for odd-lot purchases and receiving less than otherwise they would have received for odd-lot sales.

As a Third Cause of Action Against Defendant New York Stock Exchange:

21. That this third cause of action arises under the Securities Exchange Act of 1934, §§6(b), 6(d), and 19(a), 15 U.S.C. §§78f(b), 78f(d), and 78s(a).

22. That this jurisdiction of the Court is based upon the Securities Exchange Act, §27, 15 U.S.C. §78aa.

23. Plaintiff repeats and re-alleges paragraphs numbered "1" through "15", both inclusive, and paragraphs numbered "17" through "20", both inclusive.

24. That the conduct of said defendants Carlisle & Jacquelin and DeCoppet & Doremus as described above is and

has been conduct inconsistent with just and equitable principles of trade.

25. That pursuant to the Securities Exchange Act of 1934, §§6(b), 6(d) and 19(a), 15 U.S.C. §§78f(b), 78f(d) and 78s(a), said defendant New York Stock Exchange is required to adopt and enforce rules prohibiting conduct inconsistent with just and equitable principles of trade and rules insuring fair dealing and the protection of investors.

26. That said Securities Exchange Act of 1934, §19(b), 15 U.S.C. §78s(b), recognizes the jurisdiction of national securities exchanges over odd-lot differentials.

27. That notwithstanding the aforesaid statutory provisions, said defendant New York Stock Exchange, aware of the conduct of said defendants Carlisle & Jacquelin and DeCoppet & Doremus, has failed and refused to take any action preventing said defendants Carlisle & Jacquelin and DeCoppet & Doremus from imposing the aforesaid differential on plaintiff and those represented by plaintiff.

28. That as a result of the failure and refusal of said defendant New York Stock Exchange to take action, the differential is and has been greater than it would have been had said defendant New York Stock Exchange exercised its regulatory authority to eliminate and prevent conduct inconsistent with just and equitable principles of trade and to insure fair dealings and the protection of investors.

29. That as a result of such failure and refusal, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those represented by plaintiff have been damaged by paying more than they otherwise would have had to pay for odd-lot purchases and receiving less than they otherwise would have received for odd-lot sales.

WHEREFORE, plaintiff demands judgment:

A. Directing defendants Carlisle & Jacquelin and De-Coppet & Doremus to pay treble damages to plaintiff and to all members of the class represented by plaintiff in such amount as may be established upon trial of this action.

B. Directing defendant New York Stock Exchange to pay damages to plaintiff and to all members of the class represented by plaintiff in such amount as may be established upon trial of this action.

C. Directing defendants Carlisle & Jacquelin and De-Coppet & Doremus to establish a fund in an amount equal to treble that portion of the differential collected in the past which has been excessive.

D. Enjoining defendants Carlisle & Jacquelin and De-Coppet & Doremus from any further violations of the Sherman Antitrust Act, §§1 and 2, and from collecting any further excessive differentials.

E. Directing defendant New York Stock Exchange to regulate and reduce the amount of the differential and to take into account in such regulation the amount by which the differential has been excessive in the past.

F. In favor of plaintiff for costs and expenses of this action, including reasonable counsel and accounting fees.

G. For such other and further relief as may be just.

Laventhal & Zicklin
Attorneys for Plaintiff

Section 19(b), Securities Exchange Act of 1934, 15 U.S.C. §78s(b)

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

Opinion and Order of the District Court Dated September 27, 1966

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

TYLER, District Judge:

This is an action brought by a New York resident, Morton Eisen, charging the two major "odd-lot" dealers on the New York Stock Exchange—defendants Carlisle & Jacquelin and DeCoppet & Doremus—with conspiring and combining to monopolize odd-lot trading and with charging excessive fees in violation of the Sherman Act. 15 U.S.C. 1 and 2. The complaint also pleads a third claim or cause of action against the New York Stock Exchange ("Exchange") upon the theory that the Exchange breached its duties prescribed by the Securities Exchange Act of 1934 for suspension of odd-lot trading. 15 U.S.C. 78f(b), 78f(d) and 78s(a). Eisen, who describes himself as an investor, asserts that he sues for himself and on behalf of all odd-lot purchasers and sellers on the Exchange.

The taproot of Eisen's three claims is the so called "odd-lot differential" charged by the broker defendants and other odd-lot dealers for transactions in other than 100 share lots of securities. As is well known, the normal trading units on the stock exchanges are in multiples of 100 shares, sometimes called "round-lots." Odd-lots, thus, are units of stock less than 100, the established unit of trading. For odd-lot transactions, in addition to the normal brokerage commission, an additional fee known as the "odd-lot differential" is charged. At the time this suit was commenced, the differential was ⅛ point (12½ cents) per share when the price per share was 39⅞ or below and ¼ point

(25 cents) when the price was 40 or above. Effective July 1, 1966, however, this "break point" of $40 was increased to $55 under specific approval of the Securities and Exchange Commission. The execution price of an odd-lot includes the differential. On a customer's order to buy an odd-lot, the differential is added to the price of the effective offer or sale; on a customer's order to sell, the differential is subtracted from the price of the effective sale or bid. It is Eisen's theory in this case that the two broker-dealer defendants, with the benign indulgence of the Exchange, have "established, increased and maintained" the differential.

The defendants have moved pursuant to amended Rule 23(c)(1), F.R.Civ.P., effective July 1, 1966, seeking to obtain an adjudication that the present action is not maintainable as a class action. Plaintiff, of course, relies on new Rule 23 to support his suit as a class action.

Amended Rule 23(a) sets forth four specific prerequisites to a class action:

(1) The class "is so numerous that joinder of all members would be impracticable";

(2) questions of law or fact common to the class exist;

(3) claims or defenses of the representative parties are typical of those of the class; and

(4) the representative parties will adequately protect the interests of the class.

Amended Rule 23(b) specifically states that for a suit to be maintained as a class action, the specific prerequisites just listed must be satisfied and, in addition, at least one of three following requirements or conditions must be shown:

1. Prosecution of separate actions by or against separate members of the class would create a risk of incon-

sistent or varying adjudications, or adjudications which would practically dispose of or impair the interests of class members not parties thereto;

2. the party opposing the class has acted or failed to act, thereby rendering appropriate injunctive or declaratory relief respecting the entire class; or

3. the court finds that questions of law or fact common to the class predominate over such questions affecting only individual members and, in addition, that the class action is superior to other available methods or procedures for fair and efficient adjudication of the controversy. See *Notes of Advisory Committee on Amendments to Rules of Civil Procedure* (hereinafter "Advisory Com. Notes"), 39 F.R.D. 98-100.

As will be suggested by the discussion hereinafter, plaintiff's suit could only fit in theory the last-mentioned category or requirement set forth in amended Rule 23(b)—i.e. that plaintiff's suit, if to be maintained as a class action, must be shown to present questions of fact or law common to the class which predominate over such questions effecting only individual members. Suffice it to say here that, despite belated unconvincing suggestions to the contrary in their reply brief, plaintiff's counsel originally intended and argued that their client's suit meets this requirement. Thus, plaintiff in effect attempts to show that his action is what was characterized under former Rule 23 as a spurious class action, and it may be at least generally helpful to consider some of the judge-made requirements and prerequisites for maintaining a spurious class action under the old Rule in order to determine if Eisen has successfully met those specifically set forth in subparagraphs (a) and (b)(3) of the amended Rule. See discussion at 39 F.R.D. 98-103.

The spurious class action under the former Rule was considered merely a permissive joinder device, and prior to the July 1, 1966 amendment, the judgment in such cases

bound only the original parties of record and those who intervened and became parties to the action. See *Lipsett* v. *United States*, 359 F.2d 956, 959 (2d Cir. 1966); *All American Airways, Inc.* v. *Elderd*, 209 F.2d 247 (2d Cir. 1954); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Schatte* v. *International Alliance of Theatrical Stage Employees, etc.*, 183 F.2d 685 (9th Cir. 1950); *California Apparel Creators* v. *Wieder of California*, 162 F.2d 893 (2d Cir. 1947); *Cutler* v. *American Federation of Musicians, etc.*, 211 F. Supp. 433 (S.D.N.Y. 1962). The principal requirements for its use were that the character of the right sought to be enforced for or against the class be several, that there be a common question of law or fact affecting the several rights and that common relief be prayed for. Nevertheless, as I read the above cited pre-July 1, 1966, cases and others similar to them, substantially all of the specifically stated prerequisites and requirements now found in amended Rule 23(a) and (b) were deemed essential for maintaining a spurious class action under old Rule 23, even though they were not all spelled out therein. The prerequisite, for example, that the plaintiff bringing the action must be one who will fairly protect the interests of the class was one which, though recognized, did not always cause the courts undue concern, largely because only the original plaintiff and intervenors were bound by the judgment. The Court of Appeals for this Circuit, for example, having long recognized that a spurious class suit under former Rule 23 in reality was no more than a permissive joinder device, stated years ago that, in such suits, "there is no need for a searching inquiry concerning the adequacy of [plaintiff's] representation of others in the class." *York* v. *Guaranty Trust Co. of New York*, 143 F.2d 503 (2d Cir. 1944), *reversed on other grounds*, 326 U.S. 99 (1945). Notwithstanding that comparatively extreme statement, the courts in this circuit, as in others, did not permit use of the class action device under former Rule 23 where it appeared plainly that plaintiff could not properly protect the

interests of the class. See *Austin* v. *Warner Bros. Pictures*, 19 F.R.D. 93 (S.D.N.Y. 1953).

Now that amended Rule 23 purports to obliterate the old distinctions between "true," "hybrid" and "spurious" class actions, however, the requirement that plaintiff be able to fairly insure the adequate representation of all becomes considerably more significant since all members of the class are bound by the judgment unless they expressly ask to be excluded from the class. See amended Rule 23(c)(3), F.R.C.P.; *Lipsett* v. *United States, supra.*

Assuming *arguendo* that plaintiff has adequately set forth and shown compliance with other prerequisites of paragraph (a) of the new rule, he has not established that he "* * * will fairly and adequately protect the interests of the class." This alone is enough for this court to make a determination that this action cannot be maintained as a class action. See *Advisory Com. Notes,* 39 F.R.D. 100 (1966).

Plaintiff in his papers gives no compelling reasons and alleges no facts to support the proposition that he can adequately protect the interests of possibly hundreds of thousands of members of the alleged class except to assert that both of his lawyers are well-qualified antitrust specialists. In disposing of a similar contention made in *Austin Theatre* v. *Warner Bros. Pictures, supra* at 96, Judge McGohey of this court said, "However, here there is required no more than a superficial inquiry to determine that the plaintiff has failed to allege any facts to show that it will, as claimed, adequately represent the class." Such reasoning applies *a fortiori* under the new concept that all members of a class are bound by any judgment to be entered.

Eisen does not even attempt to estimate the extent of damages which he allegedly suffered as a result of the odd-lot differential, nor does he specify the nature or number of the transactions in which he engaged and wherein he was charged a "differential." A class action is premised in

part upon the theory that members of the class who are not before the court can justly be bound because the self-interest of their representatives will assure adequate litigation of the common issues. See *Aalco Laundry & Cleaning Co.* v. *Laundry Linen & Towel Chauffeurs & Helpers Union,* 115 S.W.2d 89 (Mo. App. 1938). From the facts as presented, it is impossible to determine and rule that Eisen can adequately protect the interests of the absent members of his asserted class. Concededly, he alleges that he has been an active investor in securities since 1960. We are not told, however, in what he invested. Even assuming, as Eisen would have us do, that he bought and sold securities in odd-lots—i.e. in less than 100 share blocks, we do not know which of the more than 1,600 available listed stocks he purchased or sold, the price ranges of the stocks or the considerations that motivated his transactions. That these are relevant facts is beyond serious question. In the six years during which Eisen claims to have been an investor, over 1,147,000,000 shares of stock were traded in odd-lot transactions. Some of the participants in these dealings were investors like Eisen, but just as certainly others were dealers, traders, arbitrageurs and speculators. The prices of the shares involved ranged from several dollars to several hundred dollars. The nature of the myriad odd lot transactions was certainly varied; orders were limited or contingent, on margin or for cash, long or short, and for a fixed amount or on a long term investment plan.[1] In short, even if Eisen were given leave to serve an amended pleading setting forth with particularity the nature and amount of his own investment transactions, the diverse rights and interests of other members of the claimed class plainly could not be reasonably protected by plaintiff in this litigation.

Eisen's inadequacy as a representative of the asserted class is further underscored by the obvious fact that his interest, as sole plaintiff, is miniscule compared to the in-

1. See Rule 124 of the New York Stock Exchange.

terests of the class as a whole. The number of plaintiffs bringing a class action in relation to the numerical size of the class, of course, should not be the sole basis for determining the existence or non-existence of a class action; however, it can be a valid and important factor in assessing plaintiff's ability to adequately represent the class. *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Pelelas* v. *Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir. 1940); *McArthur* v. *Scott*, 113 U.S. 340 (1884). In *Pelelas, supra* at 632, the court held, "* * * under it [Rule 23] the court is at liberty to consider the number appearing on the record as contrasted with the number in the class. * * * There must be a sufficient number of persons to insure a fair representation of the class." Eisen himself estimates—perhaps too conservatively—that the class numbers in the hundreds of thousands.[2] Thus, it is impossible to assume that he alone with a comparatively miniscule and limited interest in odd-lot transactions can represent that large a class, many of whose members necessarily have larger and different interests.

By far the most serious difficulty with plaintiff's claim to be able to properly protect the interests of the class, in my judgment, is that stemming from subparagraphs (2) and (3) of amended Rule 23(c). In substance, these provide, *inter alia*, that in a class action the best notice practicable must be furnished to the class members and that the notice must specifically warn such persons that they will be bound by any judgment in the action unless they appear and request exclusion therefrom. Further, of course, it is provided in subparagraph (c)(3) that the judgment, whether favorable or unfavorable to the class, shall include all members of the class as found by the court and who do not appear and obtain specific exclusion.

2. See defendant's affidavit by Sander Landfield wherein it is projected that there may have been as many as 3,750,000 odd-lot customers within the past four to six years.

As already suggested, this provision represents a most important substantive change from Rule 23 as it read prior to July 1, 1966. *Lipsett* v. *United States, supra.* Presumably aware of this change, Eisen claims to be the sole representative of hundreds of thousands of other persons who paid the odd-lot differential and who necessarily will be bound under Rule 23(c)(3) by any judgment in this action unless they specifically ask to be excluded after receiving appropriate notice. Yet he does not claim that one other person or entity has expressed the slightest interest in the prosecution of this action. See *Weeks* v. *Bareco Oil Co., supra* at 94. More important, Eisen and his counsel have taken the curious position in their papers and upon oral argument that press advertisements plus notices to stock exchange firms will constitute all the notice necessary in this case. To this, I am constrained to make two observations. First, in the light of the new concept under the amended Rule that members of a class are specifically bound by any judgment, favorable or unfavorable, unless they affirmatively "opt out", it is virtually certain that far better notice than plaintiff apparently contemplates would be necessary here to comply with amended Rule 23(c)(2) and, even more importantly, with due process standards. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315-320 (1950). In other words, as defense counsel have incisively argued, both the Rule and concepts of due process require individual notice for the class members who can be identified and notice amounting to more than a "mere gesture" for those who cannot be identified. Because of obvious practical financial limitations inherent in the circumstances here presented, proper notice as required almost certainly cannot be given—and plaintiff is short of the mark in his arguments to the contrary. Second, plaintiff's erroneous notion that individual notice to members of the class is not required by amended Rule 23 but that publication, either by "free publicity" or by paid advertisement in newspapers of national distribution, or by both, is

sufficient, raises the suspicion, which may or may not be justified, that he is more interested in notice for the sake of undesirable solicitation of claims than for proper protection of the interests of the other members of the class. See *Advisory Com. Notes,* 39 F.R.D. 107; *Cherner* v. *Transition Electronic Corp.,* 201 F. Supp. 934 (D.C. Mass. 1962).

For reasons similar to those leading me to conclude that Eisen cannot fairly and properly represent the other members of the class, I am not satisfied that the questions common to the class predominate over questions affecting individual members. Rule 23(b)(3); see *Advisory Com. Notes,* 39 F.R.D. 103. Mention has already been made of the tremendous size of the asserted class, the fact that there is no evidence that any other member has the slightest interest in this litigation and the necessarily varied nature and quantum of the interest of other odd-lot purchasers and sellers. In my view, these circumstances create a powerful presumption that questions affecting individual members predominate over questions common to the class, and plaintiff has offered little or nothing to rebut this presumption. Moreover, these factors plus the previously discussed difficulties of providing adequate notice to the huge class as required by the amended Rule and by concepts of due process suggest almost insuperable difficulties in fair and proper management of this suit as a class action.

The motion of defendants is granted to the extent that this action, as a class action, is dismissed. This does not mean, however, that the complaint viewed solely as a statement of the individual claims of plaintiff Eisen is dismissed; moreover, nothing herein stated should be construed as a ruling on the merits, or lack thereof, of the claims pleaded on behalf of plaintiff individually.

It is so ordered.

Dated: New York, N. Y.
September 27, 1966.

H. R. Tyer, Jr.
U.S.D.J.

Rules Enabling Act, 28 U.S.C. §2072

§2072. Rules of civil procedure.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. (June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, §103, 63 Stat. 104; July 18, 1949, ch. 343, §2, 63 Stat. 446; May 10, 1950, ch. 174, §2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, §12(m), 72 Stat. 348; Nov. 6, 1966, Pub. L. 89-773, §1, 80 Stat. 1323.)

Advisory Committee's Note to Rule 23

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the *res judicata* effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo.L.J. 551, 570-76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity* 245-46, 256-57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi.L.Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn.L.Q. 327, 329-36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, *e.g.*, *Gullo* v. *Veterans' Coop H. Assn.*, 13 F.R.D. 11 (D.D.C. 1952); *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F.Supp. 870 (W.D. Pa. 1947); *Deckert* v. *Independence Shares Corp.*, 27 F.Supp. 763 (E.D. Pa. 1939), *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd*, 311 U.S. 282 (1940), *on remand*, 39 F.Supp. 592 (E.D. Pa. 1941),

rev'd sub nom. Pennsylvania Co. for Ins. on Lives v. *Deckert*, 123 F.2d 979 (3d Cir. 1941) (see Chafee, *supra*, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, *e.g.*, *System Federation No. 91* v. *Reed*, 180 F.2d 991 (6th Cir. 1950); *Wilson* v. *City of Paducah*, 100 F.Supp. 116 (W.D. Ky. 1951); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), *cert. denied*, 323 U.S. 776 (1944); *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D. Ill. 1951); *National Hairdressers' & C. Assn.* v. *Philad Co.*, 34 F.Supp. 264 (D. Del. 1940); 41 F. Supp. 701 (D.Del.1940), *aff'd mem.*, 129 F.2d 1020 (3d Cir. 1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, *e. g.*, *Knapp* v. *Bankers Sec. Corp.*, 17 F.R.D. 245 (E.D.Pa.1954), *aff'd*, 230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del.1949); *York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on grounds not here relevant*, 326 U.S. 99 (1945) (see Chafee, *supra*, at 208); *cf. Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316, 320 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945). But *cf.* the early decisions, *Duke of Bedford* v. *Ellis*, [1901] A.C. 1; *Sheffield Waterworks* v. *Yeomans*, L.R. 2 Ch.App. 8 (1866); *Brown* v. *Vermuden*, 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spuri-

ous" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 *Moore's Federal Practice* ¶¶23.10[1], 23.12 (2d ed. 1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp.* v. *Nisley,* 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.,* 371 U.S. 801 (1963); but *cf. P. W. Husserl, Inc.* v. *Newman,* 25 F.R.D. 264 (S.D.N.Y.1960); *Athas* v. *Day,* 161 F.Supp. 916 (D.Colo.1958). On ancillary intervention, see *Amen* v. *Black,* 234 F.2d 12 (10th Cir. 1956), *cert. granted,* 352 U.S. 888 (1956), *dism. on stip.,* 355 U.S. 600 (1958); but *cf. Wagner* v. *Kemper,* 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c) (1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, *supra,* at 230-31; Keeffe, Levy & Donovan, *supra; Developments in the Law, supra,* 71 Harv.L.Rev. at 937-38; Note, *Binding Effect of Class Actions,* 67 Harv.L.Rev. 1059, 1062-65 (1954); Note, *Federal Class Actions: A Suggested Revision of Rule 23,* 46 Colum.L.Rev. 818, 833-36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ. P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all

class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (*a*) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder or the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 Buffalo L.Rev. 433, 458-59 (1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* §562, at 265, §572, at 351-52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See *e. g., Giordano* v. *Radio Corp. of Am.,* 183 F.2d 558, 560 (3d Cir. 1950); *Zachman* v. *Erwin,* 186 F.Supp. 681 (S.D.Tex.1959); *Baim & Blank, Inc.* v. *Warren-Connelly Co., Inc.,* 19 F.R.D. 108 (S.D.N.Y. 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (*b*) (*1*). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a) (2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 *Column.L.Rev.* 1254, 1259-60 (1961); *cf.* 3 Moore, *supra,* ¶23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class,

and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist.* v. *Looney,* 219 F.2d 529 (9th Cir. 1955); *Rank* v. *Krug,* 142 F. Supp. 1, 154-59 (S.D.Calif.1956), *on app., State of California* v. *Rank,* 293 F.2d 340, 348 (9th Cir. 1961); *Gart* v. *Cole,* 263 F.2d 244 (2d Cir. 1959), *cert. denied,* 359 U.S. 978 (1959); *cf. Martinez* v. *Maverick Cty. Water Con. & Imp. Dist.,* 219 F.2d 666 (5th Cir. 1955); 3 Moore, *supra,* ¶23.11 [2], at 3458-59.

Clause (*B*): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the

other members, might do so as a practical matter. The vice of an indivdual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921); *Waybright* v. *Columbian Mut. Life Ins. Co.,* 30 F.Supp. 885 (W.D.Tenn. 1939); *cf. Smith* v. *Swormstedt,* 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp* v. *Bankers Securities Corp.,* 17 F.R.D. 245 (E.D.Pa. 1954), *aff'd* ,230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway, Corp.,* 81 F.Supp. 957 (D. Del.1949); *Zahn* v. *Transamerica Corp.,* 162 F.2d 36 (3d Cir. 1947); *Speed* v. *Transamerica Corp.,* 100 F.Supp. 461 (D.Del.1951); *Sobel* v. *Whittier Corp.,* 95 F.Supp. 643 (E.D. Mich.1951), *app. dism.,* 195 F.2d 361 (6th Cir. 1952); *Goldberg* v. *Whittier Corp.,* 111 F.Supp. 382 (E.D.Mich.1953); *Dann* v. *Studebaker-Packard Corp.,* 288 F.2d 201 (6th Cir. 1961); *Edgerton* v. *Armour & Co.,* 94 F.Supp. 549 (S.D. Calif.1950); *Ames* v. *Mengel Co.,* 190 F.2d 344 (2d Cir. 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action

which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Bosenberg* v. *Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir. 1942); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), *cert. denied*, 323 U.S. 776 (1944); *cf. York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on grounds not here relevant*, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. *Cf. Dickinson* v. *Burnham*, 197 F.2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1952); 3 Moore, *supra*, at ¶23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan* v. *Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); *cf. City & County of San Francisco* v. *Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and

runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. *Cf. United States* v. *Paramount Pictures, Inc.*, 66 F.Supp. 323, 341-46 (S.D.N.Y. 1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963), *cert. denied*, 377 U.S. 972 (1964); *Brunson* v. *Board of Trustees of School District No. 1, Clarendon Cty., S. C.*, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963); *Green* v. *School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd.* v. *Bush*, 242 F.2d 156 (5th Cir. 1957), *cert. denied*, 354 U.S. 921 (1957); *Mannings* v. *Board of Public Inst. of Hillsborough County*,

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Fla., 277 F.2d 370 (5th Cir. 1960); *Northcross* v. *Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962); *Frasier* v. *Board of Trustees of Univ. of N. C.*, 134 F.Supp. 589 (M.D.N.C. 1955, 3-judge court), *aff'd*, 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. *Cf.* Chafee, *supra*, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view,

a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer* v. *F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944); *Miller* v. *National City Bank of N. Y.*, 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes* v. *Encyclopaedia Britannica*, 199 F.2d 295 (7th Cir. 1952); *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R. R.* v. *United States*, 111 F.Supp. 80 (D.N.J. 1953); *cf.* Weinstein, *supra*, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.*, 371 U.S. 801 (1963); *cf. Weeks* v. *Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Hess* v. *Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif.1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be

available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. *Cf.* Weinstein, *supra,* 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks* v. *Bareco Oil Co.,* 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also *Pentland* v. *Dravo Corp.,* 152 F.2d 851 (3d Cir. 1945), and Chafee, *supra,* at 273-75, regarding policy of Fair Labor Standards Act of 1938, §16(b), 29 U.S.C. §216(b), prior to amendment by Portal-to-Portal Act of 1947 §5(a). [The present provisions of 29 U.S.C. §216(b) are not intended to be affected by Rule 23, as amended.] In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be

theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c) (2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c) (1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d) (4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the

decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d) (2).

Subdivision (c) (2) makes special provision for class actions maintained under subdivision (b) (3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b) (3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d) (2) below.)

Subdivision (c) (3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b) (1) or (b) (2), those found by the court to be class members; in a class

action under subdivision (b) (3), those to whom the notice prescribed by subdivision (c) (2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b) (1) or (b) (2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b) (3) action the judgment "specifies" the individual members who have been identified and describes the others.

Compare subdivision (c) (4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, *supra*, ¶23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.*, 371 U.S. 801 (1963); *York* v. *Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on grounds not here relevant*, 326 U.S. 99 (1945); *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 856 (3d Cir. 1945); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del.1951); *State Wholesale Grocers* v. *Great Atl. & Pac. Tea Co.*, 24

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F.R.D. 510 (N.D.Ill.1959); *Alabama Ind. Serv Stat. Assn.* v. *Shell Pet. Corp.*, 28 F.Supp. 386, 390 (N.D.Ala.1939); *Tolliver* v. *Cudahy Packing Co.*, 39 F.Supp. 337, 339 (E.D. Tenn.1941); Kalven & Rosenfield, *supra*, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632-33 (1958); *Developments in the Law, supra*, 71 Harv.L.Rev. at 935; 2 Barron & Holtzhoff, *supra*, §568; but *cf. Lockwood* v. *Hercules Powder Co.*, 7 F.R.D. 24, 28-29 (W.D.Mo.1947); *Abram* v. *San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976-77 (S.D.Calif.1942); Chafee, *supra*, at 280, 285; 3 Moore, *supra*, ¶23.12, at 3476. Under proposed subdivision (c) (3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c) (3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, *Judgments* §86, comment (h), §116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, *supra*, at 284; Weinstein, *supra*, 9 Buffalo L.Rev. at 460.

Subdivision (*c*) (*4*). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

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Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (*d*) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d) (1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d) (2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D. Ill.1951), and 1950-51 CCH Trade Cases 64573-74 (¶62869); *cf. Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. *Cf. Oppenheimer* v. *F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961).

Subdivision (d) (2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum.

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These indicators suggest that notice under subdivision (d) (2) may be particularly useful and advisable in certain class actions maintained under subdivision (b) (3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c) (2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b) (3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c) (2), together with any discretionary notice which the court may find it advisable to give under subdivision (d) (2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry* v. *Lee,* 311 U.S. 32 (1940); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *cf. Dickinson* v. *Burnham,* 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 n. 4; see also *All American Airways, Inc.* v. *Elderd,* 209 F.2d 247, 249 (2d Cir. 1954); *Gart* v. *Cole,* 263 F.2d 244, 248-49 (2d Cir. 1959), *cert. denied,* 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, *supra,* at 230-31; *Brendle* v. *Smith,* 7 F.R.D. 119 (S.D.N.Y. 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner* v. *Transitron Electronic Corp.,* 201 F. Supp. 934 (D.Mass. 1962); *Hormel* v. *United States,* 17 F.R.D. 303 (S.D.N.Y. 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Advisory Committee's Note

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, *e.g.*, on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

United States Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.